Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ramalakshmi Ammal v. *Sivananantha Perumal Sathurayer, from the High Court of Judicature at Madras; delivered 20th April*, 1872.

Present:

SIR JAMES W. COLVILE.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

THIS is an Appeal from the High Court of Madras in a suit raising the question of the right of succession to an impartible Zemindary called Urcadu, in Tinnevelly. The litigants are two sons by different wives of Kolalinga Sethurayer, the late Zemindar.

Kolalinga Sethurayer, who was a Hindoo, married three wives. The first, Kanthunathi Ammal, had no child. His other wives were Ramalakshmi Ammal, the mother of Muttee Ramalinga Sethurayer (the Appellant) and Vellaithai Perumal Ammal, the mother of Sivananantha Perumal Sethurayer (the Respondent).

Although the mother, Ramalakshmi, is Appellant as guardian of her son, it will be convenient to speak of him as the Appellant, and of the other claimant as the Respondent.

The marriages of the two mothers took place on the same day in June 1836, but at different hours, and the priority in time of these marriages was a subject of contest in the suit.

The Courts in India have held that the marriage of the Appellant's mother was first solemnized, and that she, therefore, in order of time, was the second wife, and the Respondent's mother the third wife of the Zemindar.

In the view their Lordships take of this case, it is not necessary to consider the correctness of this finding, and they therefore adopt it in dealing with the present Appeal.

It appears that at the date of the marriages the Appellant's mother was a child only ten years old, whilst the mother of the Respondent was a girl of sixteen. The Respondent, as might naturally be expected from the relative ages of the mothers, was born many years before the Appellant, and he seeks to recover the Zemindary in this suit as the first-born son of the Zemindar. The Appellant resists his claim on the ground that he, as the son by the earlier marriage, is the rightful heir. The question is thus raised whether the son of the second wife, although born after the son of the third wife, is entitled to inherit; in other words, whether the priority in birth of the sons, or the priority in the marriages of their mothers, both being of the same caste, is to prevail in determining the succession to an impartible Zemindary in this district of Madras.

It appears from the pleadings and issues that the Respondent, the first-born son, relies on the general Hindoo law of succession, and on the custom of the family which he affirms to be in accordance with it.

The Appellant alleges that, by the custom of the district he is entitled to the succession, and he also denies that the general Hindoo law is in favour of the Respondent's claim.

Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession that they should be ancient and invariable: and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.

In the present case their Lordships agree in opinion with the High Court that the Appellant has failed to prove the special custom which he undertook to establish.

It appears from the Record that, in 1861, during the life of their father the late Zemindar, the Appellant brought a suit in the Civil Court of Tinnevelly against the present Respondent, to have his right to the succession declared. He founded his claim on the usage in his fathers Zemindary and "other Zemindaries." The present Respondent then relied, as he still does, on the general Hindoo law, and the usage of the family. The Civil Judge was of opinion that the evidence to support a family usage was insufficient for the purpose, but he thought there was sufficient proof of a usage prevailing amongst the Zemindars of the district that the son of the senior wife was to succeed. The decision of this Judge in favour of the present Appellant appears to have been reversed on appeal, on the ground that the suit was not maintainable during the life of the father; but it has been necessary to advert to the suit, because the evidence taken in it has by consent been brought into the present suit, and is the only evidence in it.

This evidence consisted, so far as proof of the family usage went, principally of the testimony of the late Zemindar himself, who was a party to the Declaratory suit, and, evidently, he is not a trustworthy witness, for whilst in that suit he espoused the cause of the present Appellant, and gave evidence of the family usage in his favour, he had some years before, and after both sons were born, given equally strong evidence of a custom the other way in support of the claim of the present Respondent. It is obvious that the Zemindar's testimony was influenced by his partiality for one son or the other at the time of giving it, and is thus entirely untrustworthy. The other evidence is conflicting and wholly insufficient to establish any family custom. Indeed in the present suit both the Courts in India have so regarded it.

Then with respect to the usage of the district set up by the Appellant, the only evidence, apart from the conflicting testimony just referred to, which appears on the Record, is a statement of certain Declarations alleged to have been made by some Zemindars under the following circumstances. In the year 1849 the Board of Revenue acting as the Court of Wards desiring to know which of

the two minor sons of the Zemindar of Parayur was to succeed him, requested the Collector of Tinnevelly and Madura to ascertain the rule of succession "as regards sons by different wives," and it appears from the Collector's letter to the Secretary of the Board, that the opinions of twenty Zemindars and Poligars were collected, copies of which he sent, giving also, at the same time, an abstract of them in his letter. It seems that the Court of Wards acted upon the opinions thus obtained.

The only evidence offered of these opinions was the above letter and abstract of the collector, and objections were made to its reception in proof of the custom.

Considerable, and perhaps undue, laxity in admitting documents has been sometimes allowed by the Indian Courts; but their Lordships consider that, whilst it may not be desirable, in all cases, to apply strict and technical rules to the admissibility of evidence in the Courts in India, the substantial principles on which the authenticity and value of all evidence rest should be observed. One of these principles is that the best evidence of which the subject is capable ought to be produced, or its absence reasonably accounted for or explained before secondary and inferior evidence is received. There seems to be no reason in this case why the Zemindars or some of them might not have been called as witnesses, when, of course, they would have been subject to cross-examination; but not only were none examined, but even their written opinions, as they gave them, were not produced. Their Lordships consider, agreeing with the High Court, that the only evidence offered, viz., the collector's letter and summary, was not properly admissible, and if received, could not be safely relied on as affording clear and unambiguous proof of the existence of an ancient and invariable custom in the district.

The summary of the collector (if it may be looked at) discloses that the Zemindars were not unanimous in their view of the custom; and it further appears that their opinions were given with reference to the succession to a Zemindary in a family of a different caste. The late Zemindar,

who was one of those vouched, differed from the majority, and declared that the eldest son, although by the junior wife, would succeed. It is true that, for the reasons already given, much reliance cannot be placed on his statement, but, so far as it may be of any value, it negatives the alleged custom, at all events as one prevailing in his own caste and Zemindary.

It was insisted by the learned counsel for the Appellant that the fact that the priority of the marriages of the second and third wives was made a question in the Declaratory Suit and in this suit, and strongly contested, indicated an impression on the minds of the litigants that a custom existed to the effect alleged by the Appellants, for if there were no such custom, the contest as to the priority of the marriages was immaterial. At first sight this seemed to be so. But the inference from it is greatly weakened, if not destroyed, by the consideration that in the Declaratory Suit brought in the Zemindar's lifetime, and to which he was a party, the Zemindar himself, contrary to his former view, set up the custom which would give the succession to the Appellant, whom he was then supporting, in opposition to the Respondent, his eldest son. When the father, from whatever motive, put forward this view of the custom, it was natural that the fact of the priority of the marriages should be made a question in the suit, as well as the nature of the custom.

The attempt on both sides to prove a special custom having failed, it remains to consider what is the general Hindoo Law applicable to this disputed succession.

The case stands in this respect in the same category as that in the Appeal relating to the Zemindary of Shivagunga, which was decided by this Board in 1863. Their Lordships, in giving judgment in that Appeal, say: "The Zemindary is in the nature of a Principality, impartible, and capable of enjoyment by only one member of a family at a time; but whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings) the rule of succession to it is now admitted to be that of the general Hindoo law prevalent in that part of India, with such qualifica-

tions only as flow from the impartible character of the subject." Such, also, must be the rule of succession to be applied in the case now under appeal.

The High Court, in their judgment in the present case, declare that "no work of authority or decision" had been cited or found directly giving the rule of descent. That this should be so may, perhaps, be explained by the fact that succession by primogeniture is the rare exception to the ordinary rule in Hindoo families, taking place only upon the descent of some impartible subject, as a Raj or office, and that in most cases of the kind there has probably been found some local or family usage regulating such descent.

If, however, it really be that the rule of succession is not directly declared in books of authority, or in decided cases, then it must be deduced from those rules which are settled, and the principles on which they are founded.

The learned counsel on both sides referred to various texts with this view; and it appears to their Lordships that many of these supply authority from which the law may, with reasonable certainty, be inferred and declared.

One great rule of religion binding upon every Hindoo is the duty of having a son, not only for the sake of the spiritual benefits he obtains for himself by his birth, but because he thereby discharges the pious debt he owes to his ancestors. And, as a consequence naturally flowing from this law, the first-born son is, throughout the books of authority, treated as pre-eminent amongst his brothers, and held to be entitled to many special privileges.

It will be found, from numerous authorities and instances, that, although the father's property, by the general rule, descends upon all his sons, yet, whenever it becomes necessary to make a distinction, precedence is given to the first-born.

Thus, Menu, after laying down the cardinal rule of succession that brothers divide the paternal property among them, adds "The eldest brother may take entire possession of the patrimony; and the others may live under him as they lived under their father, unless they choose to be separated" (c. 9, s. 105).

"By the eldest, at the moment of his birth, the father having begotten a son, discharges a debt to his own progenitors. The eldest son, therefore, ought, before partition, to manage the whole patrimony" (c 9, s. 106).

"That son alone, by whose birth alone he discharges his debt, and through whom he attains immortality, was begotten from a sense of duty" (c. 9, s. 107). See also s. 137, 138.

Many of the precepts of Menu have been undoubtedly altered and modified by modern law and usage; but his authority may properly be referred to when it is necessary to resort to first principles in order to ascertain and declare the law. The general doctrines above alluded to are also found in other old authorities, and are treated as part of the foundation of the Hindoo law of succession by modern writers and compilers. (See 1 "Strange's Hindoo Law," 192, Col. Dig., Book V.)

It is true that these doctrines occur in passages treating of divisible inheritances; but the presumption from them is irresistible, that in the case of an inheritance which is from its nature indivisible, and can therefore go to one only of several sons, the first-born by reason of his general pre-eminence, should be preferred to his younger brother.

It was not disputed that this would be so in the case of several sons by the same mother; but it was contended that, where there were sons by different wives, the priority of marriage and not of birth was to be regarded. No authority whatever was cited to support this contention, certainly none as regards the sons by any wives after the first. On the contrary, there is a good deal of authority pointing to the conclusion that there is no distinction, except seniority of birth, amongst the sons of wives of the same caste and class.

Thus Menu says, "a younger son being born of a first marriage after an elder son had been born of a wife last married *but of a lower class*, it may be a doubt *in that case* how the division shall be made." (C. 9, sec. 123.)

The doubt thus suggested whether, even in the case of a wife of a lower class, there would be inequality of division amongst the sons, raises a strong presumption that there would be none where the mothers were of the same class. But the

matter does not rest on presumption, for the 125th section runs thus :—

"As between sons born of wives equal in their class, and without any other distinction, there can be no seniority in right of the mother ; *but the seniority ordained by law is according to birth.*"

It is true the writer is in this section treating of partible successions, but he is at the same time proclaiming the privileges to which the eldest son is entitled, and one of them he had just declared in a preceding section (119) thus :—

"Let them never divide the value of a single goat or sheep ; a single goat or sheep, remaining after an equal distribution, belongs to the first-born."

Now, when it is said that the single goat or sheep is to belong to one son, it is apparently for the same reason that a Zemindary so descends, viz., that the subject is in its nature impartible ; and, therefore, the rule that is laid down with reference to one impartible subject, viz., that "it belongs to the first-born," appears by reasonable and just implication to be the rule applicable to all such subjects. And which of several sons is to be deemed the first-born is declared by section 125 above cited, "there can be no seniority in right of the mother, but the seniority ordained by law is according to birth."

It appears to their Lordships that the rules just cited approach very nearly to a distinct declaration of the general Hindoo law upon the question, when regarded apart from any special custom prevailing in a particular district or family.

Great reliance was placed, during the argument, on the admission supposed to have been made, that the son of the first wife would succeed before an elder brother by a subsequent wife, and it was contended that, by analogy, the son of the second wife must be entitled to the like precedence over the son of the third. There are, undoubtedly, authorities which show that the first wife occupies a position of honour and precedence above all others, but it is not necessary for their Lordships to decide whether the admission made in this case is in accordance with general Hindoo law ; for supposing the law to be so, no just analogy can be established between the status of the first wife

and that of any subsequent wife. Her title to special rank and privileges rests upon grounds peculiar to the first wife, and which can have no application to others. (See 1 Strange's Hindoo Law, pp. 55 and 56). The reasons upon which she alone of all the wives, is entitled to peculiar honour and privileges, rather point to the conclusion that the wives subsequently married, if of the same caste and class, are on an equal footing.

It is right to observe that, if the decision had to rest only upon reasons of policy and convenience, these reasons would seem greatly to preponderate in favour of the right of the first-born son. The inheritances of Hindoos which descend on a single heir, are almost entirely confined to Zemindaries, in the nature of a Raj, and to offices (see "Norton's Leading Cases," part I, p. 278), and it is obviously in accordance with reason and convenience that such successions should devolve upon the son who would, in natural course, first reach manhood, and be capable of discharging the duties attaching to inheritances of this kind. But their Lordships do not find it necessary to place their decision on these grounds; they are of opinion, that upon the principles of law deducible from the authorities, the judgment of the High Court is correct, and ought to be upheld.

It appears that the decision under appeal has been followed by the High Court of Bombay (Bhujangra bin Ghorpade against Malojira bin Ghorpade, 5 Bombay High Court Reports, 161).

Their Lordships are glad that they are able to come to a conclusion which will not disturb the rule of succession declared by the concurrent judgments of the High Court in two Presidencies; and they will, in this case, humbly advise Her Majesty to affirm the judgment of the High Court of Madras and to dismiss this Appeal with costs.

PRINTED AT THE FOREIGN OFFICE BY T. HARRISON.—23/4/72.